

D.P.U. 91-DS-44

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by C. Palladino Company, Incorporated.

APPEARANCE: Mario Reid, Compliance Officer
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On August 26, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to C. Palladino Company ("Respondent"). The NOPV stated that the Division had reason to believe that on August 5, 1991, the Respondent performed excavations at 686A Washington Street, Brookline, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to underground facilities operated by Boston Gas Company ("Boston Gas" or "Company").

On September 18, 1990, the Respondent met with the Division during an informal conference and stated that it had not violated the Dig-Safe Law. During that conference, the Respondent also asserted that the damage it caused to a Company service line was due to the Company's failure to mark the facilities properly. In a letter dated October 28, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and of its right to request an adjudicatory hearing.

On November 4, 1991, the Respondent requested an adjudicatory hearing by phone pursuant to 220 C.M.R. § 99.07(3). On May 15, 1992, the Department sent due notice to the Respondent regarding an adjudicatory hearing. After this notice, an adjudicatory hearing was held on June 11, 1991 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. At the hearing, Mario Reid, a compliance officer for the Division, represented the Division and presented two witnesses. No one appeared in behalf of the Respondent at the hearing. At that time, Mr. Reid requested that the case be dismissed and that the prior penalties

be reinstated. As of November 16, 1993, the Department has not been contacted by the Respondent.

II. STANDARD OF REVIEW

According to Department precedent, if a Respondent fails to appear at a properly noticed adjudicatory hearing, the Department has reason to dismiss the Respondent's case on grounds "that the Respondent has failed to pursue its claim," therefore reinstating the prior determination of the Division. Masachi Engineering Corporation, D.P.U. 86-DS-117 (1993); J.P.T Excavators, D.P.U. 91-DS-47 (1993); Signal Construction Company, D.P.U. 89-DS-95 (1990); Paul Marusare, D.P.U. 87-DS-85 (1988). In addition, in instances where a party has failed to appear at one or several scheduled adjudicatory hearings and is found to have failed to pursue its claim, the Department has held that the maximum allowable civil penalty of \$1,000 may be imposed. See DiGregorio Construction Company, D.P.U. 87-DS-179 (1990).

III. ANALYSIS AND FINDINGS

In this case, the Department has followed due process as defined in 220 C.M.R. § 99.00 et seq. by scheduling and holding an informal conference, issuing a remedial order, informing the Respondent of its rights to an adjudicatory hearing, by holding an adjudicatory hearing as defined in G.L. c. 30A, and providing timely notice of that hearings to the Respondent. In that notice, the Department informed the Respondent that a failure to attend the hearing might result in dismissal of the appeal and enforcement of the prior informal decision, but the Respondent still failed to appear at the scheduled hearing or contact the Department. Accordingly, because the Respondent failed to appear at the scheduled adjudicatory hearing and failed to contact the Department before

or after that hearing, the Department finds that the Respondent has failed to pursue its claim. Therefore, the Respondent's appeal is dismissed, with prejudice, and the previous informal decision is reinstated.

In regard to the amount of the civil penalty to be imposed upon the Respondent, the Department has wide latitude due to the de novo nature of the adjudicatory hearing. In the instant case, the Respondent failed to pursue its claim, which allows the Department to impose the maximum civil penalty allowed upon the Respondent. However, in light of the fact that this Dig-Safe violation is the first for the Respondent, the Department imposes the minimum civil penalty of \$200.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That C. Palladino Company, Incorporated failed to pursue its claim and it is

ORDERED: That C. Palladino Company, Incorporated, being a violator of the Dig-Safe Law, shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,